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SUPREME COURT OF THE UNITED STATES

CASE NO. 75-1365

JACK R. WHEELER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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BRIEF IN OPPOSITION TO A PETITION
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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE PETITIONER WAS DEPRIVED OF HIS RIGHT TO PROTECTION UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION AS MADE APPLICABLE TO THE STATE OF FLORIDA BY THE FOURTEENTH AMENDMENT:

(a) WHETHER "MIRANDA TYPE" WARNINGS MUST BE GIVEN TO A GRAND JURY WITNESS WHO IS CALLED TO TESTIFY ABOUT CRIMINAL ACTIVITIES IN WHICH HE MAY HAVE BEEN PERSONALLY INVOLVED? (RESTATED)

(b) WHETHER, IN THE ABSENCE OF CAUTIONARY INSTRUCTIONS, FALSE STATEMENTS MADE TO THE GRAND JURY MUST BE SUPPRESSED IN A PROSECUTION FOR PERJURY BASED ON THOSE STATEMENTS? (RESTATED)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution guarantees every person the privilege against compulsory self-incrimination. It provides in pertinent part:

> "No person *** shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law***."

The Fourteenth Amendment of the United States Constitution imposes the Fifth Amendment upon the States.

STATEMENT OF THE CASE

Respondent generally accepts Petitioner's Statement of the Case insofar as it is accurate, non-argumentative and supported by the correct reference to a portion of the State Court Record.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth District, which affirmed Petitioner's conviction and sentence on April 25, 1975, is reported at 311 So.2d 713 (4DCA Fla. 1975) (Petitioner's Appendix C, A 4-11).

Petitioner's Petition for Writ of Certiorari in the Supreme Court of Florida and Petition for Rehearing was denied by Order of the Court without opinion on February 2, 1976, and has not yet been reported (Petitioner's Appendix A and B, A 1-3).

JURISDICTION

Petitioner in his jurisdictional statement in the Petition for Writ of Certiorari has accurately set forth the applicable statutory and court rules which would authorize the present application for Writ of Certiorari by this Court.

However, the issuance of a Writ of Certiorari by this Court is an act done only when the case before it clearly presents special and important reasons therefore (Rule 19 of the Rules of the Supreme Court of the United States). Respondent believes Petitioner's case is not one establishing any compelling reasons for this Court's assumption of jurisdiction and the issuance of the Writ of Certiorari, in view of the fact that the issues Petitioner raises are identical

to those recently ruled upon by this Court in United States v. Mandujano, ___U.S.___, Case No. 74-754, decided May 19, 1976. It is Respondent's contention that the Mandujano decision is dispositive of the questions presented in the instant case, and that the holding in Mandujano would affirm Petitioner's judgment and conviction Thus, Respondent would submit that this case involves no new or claimed new principle of law nor any determination by a State Court of any federal question.

ARGUMENT

In an attempt to have this Court erode the broad investigatory powers which have been accorded to grand juries, Petitioner asserts that as a predicate to testifying before that body, Miranda warnings must necessarily be given to a "putative defendant." He contends further that the failure to give such warnings must result in the suppression of any false statements made by the witness to the grand jury in a subsequent perjury prosecution based on those statements. In support of this position, Petitioner primarily relies on the decision of the United States Court of Appeals of the Fifth Circuit in United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), which was being considered by this Court, under Case No. 74-754, at the time Petitioner filed the instant Petition for Certiorari.

Petitioner, in challenging his perjury conviction, in effect asks whether the warnings called for by Miranda v. United States, 384 U.S. 436 (1966), must be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved; and, whether absent such warnings, false statements made to the Grand Jury must be suppressed in a prosecution for perjury based on those statements. Finding this to be the identical question of law based on essentially the identical facts as Mandujano, Petitioner suggests that this Court's resolution of the issue in Mandujano will be dispositive of the case sub judice. Respondent agrees.

The factual situation involved in Mandujano, differs from the instant case only slightly. Defendant Mandujano was called before a grand jury investigating illegal drug traffic. The witness, a target of the investigation, gave false statements to the grand jury and was subsequently indicted for perjury. Prior to trial, the defendant moved to suppress his grand jury testimony based on inadequate Miranda warnings. The Motion was granted by the trial court which held that the defendant, when called before the grand jury had been a "putative" or "virtual" defendant and therefore was entitled to full Miranda warnings prior to testifying.

The United States Court of Appeals, for the Fifth Circuit, in affirming the lower Court's ruling found 1) that a

putative defendant may not be called to testify before a grand jury without being given full Miranda warnings, and be necessary implication, that such an individual has an absolute right to remain silent (i.e. to refuse to give any testimony whatsoever, whether or not incriminating) and also a right to appointment of counsel; 2) that Petitioner was, at the time he was called to testify before the grand jury, a "putative defendant"; and 3) that it is appropriate to suppress the perjurious testimony of a putative defendant who has not been given full Miranda warnings. United States v. Mandujano, 496 F. 2d 1050 (5th Cir. 1974).

Certiorari was granted and (perhaps to the chagrin of Petitioner) this Court on May 19, 1976, rendered its decision, reversing the ruling of the Court of Appeals.

The majority opinion, authored by Mr. Chief Justice Burger, holds that there is no requirement that Miranda warnings be given to any grand jury witness being called to testify about criminal activities in which he (witness) may have been personally involved. Further, the Court found that the failure to give these warnings does not violate either the self-incrimination privilege or due process requirement. Therefore, the opinion concludes, the absence of cautionary instructions will not preclude the use of any and all false statements made to the grand jury in a subsequent prosecution of the witness whether considered a putative

defendant or mere witness) for perjury based on those statements. United States v. Mandujano, ___ U.S. ___, supra.

Respondent contends that this Court's holding in Mandujano, will affirm Petitioner's State conviction. Comparing the factual situations, the similarities are readily seen. The primary difference is in the fact that in Mandujano, the defendant was given some cautionary instructions, while Petitioner was given none. It might appear that this difference is crucial, however, Respondent contends otherwise.

In Mandujano, this Court makes no distinction between minimal Miranda warnings and the total absence of them. In reversing the decision of the Court of Appeals, this Court cited with approval the language of United States v. Orta, 253 F.2d 312 (5th Cir. 1958), which held that:

> "...the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned before a Grand Jury." United States v. Mandujano, ___U.S.___, at 6.

In its holding in Mandujano, this Court, finding that Miranda warnings are not required for grand jury witnesses (as opposed to their necessity prior to custodial interrogation), emphasized the

role of the grand jury in our system of criminal justice and distinguished it from custodial interrogation.

The grand jury has been vested with substantial and broad investigative powers. "Its responsibilities continue to include...the protection of citizens against unfounded criminal prosecutions." United States v. Calandra, 414 U.S. 338, 343-344 (1974), and the scope of its powers continues to reflect its "special role in insuring fair and effective law enforcement: (ibid). See also, Branzburg v. Hayes, 408 U.S. 665, 686-700 (1972). Among its many powers, is the grand jury's authority to compel the attendance and testimony, Kastigar v. United States, 406 U.S. 441, 443 (1972), in addition to its authority and ability to compel the production of evidence. United States v. White, 322 U.S. 694 (1944). United States v. Mandujano, ___ U.S. ___ at 7. Precisely because of its special constitutional role (and in sharp contrast to custodial police interrogation), "the long standing principle that 'the public...has a right to every man's evidence'... is particularly applicable to grand jury proceedings" Branzburg v. Hayes, supra at 688), where the duty to testify has long been recognized as a basic obligation that every citizen owes to his government. Blackmer v. United States, 284 U.S. 421, 438 (1932).

> "the grand jury's authority to compel testimony is not, of course without limits.

> The same Amendment that establishes the grand jury also guarantees that 'no person ... shall be compelled in any criminal case to be a witness against himself....' The duty to give evidence to a grand jury is therefore conditional; every person owes society his testimony, unless some recognized privilege is asserged.
>
> Under settled principles, the Fifth Amendment does not confer an absolute right to decline to respond in a grand jury inquiry; the privilege does not negate the duty to testify but simply conditions that duty. 'Ordinarily, of course, a witness has no right of privacy before the grand jury.' Calandra, supra at 353." United States v. Mandujano, ___U.S.___ at 7-8.

While witnesses called by a grand jury are legally bound to give testimony, Calandra, supra at 343, the Fifth Amendment privilege against self-incrimination may be asserted during proceedings before a grand jury. Counselman v. Hitchcock, 142 U.S. 547 (1892). A witness can also

"be required to answer before a grand jury so long as there is no compulsion to answer questions that are self incriminating.... The witness must invoke the privilege, however, as the 'Constitution does not forbid the asking of criminative questions.' United States v. Monia, 317 U.S. 424 at 433 (Frankfurter, J. dissenting).

'The (fifth) Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment.' 317 U.S. 427.

Absent a claim of the privilege, the duty to give testimony remains absolute." United States v. Mandujano, ___ U.S. ___ at 10.

When Petitioner was subpoenaed to appear before the grand jury, he had no right to be informed, prior to testifying,

that his testimony might be used against him. The right presupposes a question and an assertion of the right on the basis of the content of the question. McCarthy v. Arndstein, 266 U.S. 34 (1924); Hoffman v. United States, 341 U.S. 479 (1951).

Even assuming that a grand jury witness could not have voluntarily waived his right against self-incrimination, such lack of voluntarily waiver would not preclude prosecution for perjury committed in his testimony before a grand jury. United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972); cf., Glickstein v. United States, 222 U.S. 139, 142 (1911). Beyond this, it has been held, in refusing to permit a witness' attempt to protect perjured testimony that "the Fifth Amendment privilege cannot be construed to include the right to commit perjury." Harris v. New York, 401 U.S. 22, 225 (1970).

United States v. Orta, cited with approval by this Court in Mandujano, held that even though a witness had not voluntarily waived his Fifth Amendment rights, he could not thereafter commit perjury with impunity, as the protection of the Fifth Amendment only relates to crimes alleged to have been committed before the time when the testimony is sought. United States v. Orta, 253 F.2d 312 (5th Cir. 1958), cert.den. 357 U.S. 905 (1958).

Furthermore, in United States v. DiGiovanni, 397 F.2d 409 (7th Cir. 1968), cert den. 393 U.S. 924 (1968) the court

held that failure to give Miranda warnings to a grand jury witness, including one as to whom the proceedings have become accusatory, does not bar perjury prosecution for allegedly false testimony before that grand jury.

> "in this constitutional process of securing a witness' testimony, perjury simply has no place whatsoever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." United States v. Mandujano, ___ U.S. ___ at 11.

Sanctions for false statements or perjury have consistently been allowed by this Court. See e.g. Bryson v. United States, 391 U.S. 64 (1969).

> "The shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances." Oregon v. Hass, 420 U.S. 714, 723 (1975).

In this light, it has been ruled that perjured statements fall outside a statutory grant of blanket immunity from the further use of that testimony. See Glickstein v. United States, supra.

> "It cannot be thought that as a general principle... a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions--lying is not one of them." Bryson v. United States, supra at 72.

Although grand jury witnesses may be advised of the nature and scope of the inquiry, such has not been considered a fundamental right in Florida. Dinnen v. State, 168 So.2d 703 (2DCA Fla. 1964). Further, the Judiciary of this State has found no requirement for a witness to be warned that if he fails to testify truthfully, he may suffer the pain of a perjury conviction, his oath being sufficient notice. Gordon v. State, 104 So.2d 524, 532 (Fla. 1958).

Petitioner's contentions revolve around his assertion that he was a putative defendant, thus Miranda warnings were required. While Respondent does not concede that Petitioner was indeed a putative defendant, the trial court found

that the investigation centered on him. The facts indicate, not that Petitioner was the only target of the investigation, but rather at the time he appeared before the grand jury, it was to determine if there had been any violation of Florida's anti-nepotism statute, Section 116.111, Florida Statutes, and whether malfeasance had been committed, contrary to Sections 839.11 and 839.13, Florida Statutes. Clearly the crime of perjury had not yet been committed.

Petitioner's claim that he was a "putative defendant" will have absolutely no bearing on the validity of his perjury conviction. United States v. Mandujano, ___ U.S. ___, supra. No impropriety results from the calling, by the grand jury, of a target of its investigation. "The obligation to appear (before the grand jury) is no different for a person who may himself be the subject of the grand jury inquiry." United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973). Once called, his responses are presumed to be as voluntary as those of any other witness.

> "The fact that here the grand jury interrogation had focused on some ... specific activities does not require that these important principles be jettisoned; nothing remotely akin to 'entrapment' or abuse of process is suggested by what occured here." Mandujano, supra at 19.

Asserting a requirement for Miranda warnings, in effect equates an appearance before a grand jury with police interrogations of a person in custody. Miranda v. United States, supra at 444, n.4. The two are simply not equal. Clearly, the Miranda warnings were never intended to create a "constitutional straitjacket" Miranda, supra at 467, to be applied across the board to every form of official questioning.

> "Miranda addressed extra-judicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards. The decision expressly rested on the privilege against compulsory self-incrimination; the prescribed warnings sought to negate the 'compulsion' thought to be inherent in police station interrogation. But the Miranda Court simply did not perceive judicial inquiries and custodial interrogation as equivalents."
>
> "The Court thus recognized that many official investigations, such as grand jury questioning, take place in a setting wholly different from custodial police interrogation.... To extend these concepts to questioning before a grand jury inquiring

> into criminal activity under the guidance of a judge is an extravagant expansion never remotely contemplated by this Court in Miranda; the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court. United States v. Mandujano, ___ U.S. ___ at 14-15.

The interpretation of Miranda which Petitioner asserts,

> "would require that the witness be told that there was an absolute right to silence, and obviously there is no such right before a grand jury.... (A) grand jury witness... has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim. United States v. Mandujano, supra at 16.

Following the holding in Mandujano, Petitioner's contentions must necessarily fail.

Each facet of the central question Petitioner has raised has been expressly repudiated by the Court. Thus there is no basis for the suppression of Petitioner's

statements before the grand jury. Perjury is simply not excusable on Fifth Amendment grounds. In making the false statements, the Petitioner took a "course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take..." Bryson v. United States, supra at 82. Rather than inculpate himself in a criminal act occurring in the past, the defendant had in effect committed a new criminal act. "When (he) responded to the pressure under which he found himself by communicating false information this was simply not testimonial compulsion." Ibid. Therefore, there is no basis for the suppression of Petitioner's statements.

Finally, Respondent submits that the facts involved in the instant case so closely resemble those in Mandujano, that, premised upon this Court's holding in Mandujano, the decision of the State Court must be affirmed.

Petitioner was properly called before the grand jury. While he may have been a target of that body's investigation, the inquiry was into possible criminal activities of Petitioner, i.e. malfeasance of a public official and a violation of the State's anti-nepotism statute. Petitioner was, clearly, not being investigated for perjury. It therefore follows that there is no basis whatsoever, for the suppression of his false statements made before the grand jury. Lest it be forgotten, "A witness, sworn to tell the truth before a

duly constituted grand jury will not be heard to call for the suppression of false statements made to that jury." United States v. Mandujano, __U.S.__ at 17-18.

CONCLUSION

WHEREFORE, the decision of the State Courts should be affirmed and the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent in Opposition has been furnished this _____ day of June, 1976, to Honorable Joseph A. Varon, Varon, Stahl & Kay, 2432 Hollywood Boulevard, Hollywood, Florida 33020.

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